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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 378

ANDREW V. ALLISON,
PETITIONER

VS.

THE UNITED STATES

Petition for a Writ of Certiorari to the United States Court of Claims

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CLEMENS PRINTING COMPANY - SAN ANTONIO, TEXAS

INDEX

	Pages
1. Prayer for Writ of Certiorari	1
2. Opinion Below	1
3. Jurisdiction	2
4. Questions Presented	2
5. Statutes Involved	2
6. Statement	3
7. Reasons for Granting the Writ	5
8. Argument	
(a) Veterans Administration by valid interpretation of Act of August 10, 1956, paid Plaintiff for 11 days' pay for calendar years 1953 and 1954, in which years Plaintiff was on military leave of absence. This sum of money thus became Plaintiff's vested property.	6
(b) Nineteen months later Veterans Administration added limitations to the Act of August 10, 1956 and confiscated the Plaintiff's current wages for the amount it had previously paid him under the clear terms of that Act.	6
(c) Court of Claims held that there is no essential difference between the Act of May 12, 1917, the Armed Forces Reserve Act of 1952, and the Act of August 10, 1956; that none of them include active duty generally, but only a special type of training duty, and even that is limited to pay only once per tour of active duty, instead of once per calendar year as the Act provides.	7-8
(d) Comptroller General's decisions have held that the broadened benefits of the Act of August 10, 1956 related back to January 1, 1953, the effective date of the Armed Forces Reserve Act of 1952, which substantially changed the former laws on the subject.	9-13
(e) A governmental agency cannot add restrictions to an Act of Congress, and then confiscate an employee's current wages for the amount it had lawfully paid him under a valid interpretation of that Act.	14
9. Summary	14
10. Conclusion	14
11. Appendix A	15-21
12. Appendix B	22-25

AUTHORITIES CITED

Cases

	Pages
1. **Lake County vs. Rollins,** 130 U. S. 662	12
2. **United States vs. Temple,** 105 U. S. 97	12
3. **Ware Knitters, Inc. vs. United States,** 144 Ct. Cl. 141	12
4. **Yates vs. United States,** 354 U. S. 298	12
5. **B131514** 37 Comp. Gen. 39 dated July 22, 1957	4
6. **B133972** 37 Comp. Gen. 255 dated October 17, 1957	4,11
7. **B134171** 37 Comp. Gen. 313 dated November 8, 1957	4,10
8. **B134171** 37 Comp. Gen. 608 dated March 19, 1958	4,11

Text Books

1. **Black on Interpretation of Laws,** 2nd Ed., West Publishing Co., pages 141 and 447	13
2. **Bouvier's Law Dictionary,** Vol. 1, Rawles' 3rd Ed., page 205	7

Statutes

1. Act of May 12, 1917 (40 Stat. 72) (10 USC 371	8,9
2. Naval Reserve Act of 1925 (43 Stat. 1089, Sec. 36)	9
3. Act of July 1, 1947 (61 Stat. 238)	6,9
4. Armed Forces Reserve Act of 1952, Sec. 804 (a) (66 Stat. 506) (50 USC 901)	2,5,6,9
5. Act of August 10, 1956, Sec. 29 (a) (70A Stat. 632) (5 USC 30r)	2,4,5,6,8,9,10,13
6. Act of August 10, 1956, Sec. 101 (22) (70A Stat. 5)	7
7. 28 USC 1491 (62 Stat. 940)	4
8. 28 USC 1255 (62 Stat. 928)	2,5
9. 50 USC Appendix 459 (c) and (g) (62 Stat. 914)	4,7,11,14
10. PL 85-861 approved September 2, 1958 (72 Stat. 1557)	13
11. PL 86-559 Sec. 7 approved July 1, 1960 (74 Stat. 282)	13
12. PL 87-378 approved October 4, 1961 (75 Stat. 809)	13
13. House Report No. 970 and Senate Report No. 2484, 84th Congress, 1st Session to accompany HR 7049 which became the Act of August 10, 1956 (U. S. Code Cong. & Ad. News, Vol. 3 p. 4620 and p. 4640 (1955) 84th Cong. 2nd Sess.	10
14. House Report No. 483 on the Act of July 1, 1947, U. S. Code Cong. Serv. 80th Cong. 1st Sess. p. 1266	7

APPENDICES

A. Decision of the United States Court of Claims No. 478-60 in the case of Andrew V. Allison v. the United States	1,6,8,12,14
B. Settlement Certificate No. Z1794280 from Comptroller General to Andrew V. Allison, dated November 1, 1960	4,8

IN THE

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No. . . . . :

ANDREW V. ALLISON,
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VS.

THE UNITED STATES

Petition for a Writ of Certiorari to the United States Court of Claims

---

The Petitioner, Andrew V. Allison, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims, entered in the above entitled case on April 4, 1962.

OPINION BELOW

The opinion in the above entitled case is, as of the date of this petition, unpublished in bound volume of the Court of Claims reports. A copy is contained in the record of the case certified by the United States Court of Claims (R. 47), and is also appended to this petition as Appendix A.

JURISDICTION

The judgment of the United States Court of Claims was entered on April 4, 1962 (R.-47), and Plaintiff's Motion for a Rehearing (R.-53) was filed on April 30, 1962 and was overruled on June 6, 1962 (R.-66). The jurisdiction of this Honorable Court is under Title 28 USC Section 1255.

QUESTIONS PRESENTED

Whether an administrative agency of the United States can add restrictions to an Act of Congress, and then confiscate monies previously paid an employee under the express terms of such Act of Congress.

STATUTES INVOLVED

Section 804 (a) of the Armed Forces Reserve Act of 1952 (66 Stat. 506) (50 USC 901), which became effective January 1, 1953:

> "All officers and employees of the United States or of the District of Columbia who shall be members of the reserve components of the Armed Forces shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be ordered to active duty for training, or active duty, or to duty with troops or at field exercises, or for instruction, for periods not to exceed 15 days in any one calendar year."

Section 29 (a) of the Act of August 10, 1956 (70 A Stat. 632) (5 USC 30 r) entitled:

"An Act to revise, codify and enact into law, Title 10 of the United States Code entitled 'Armed Forces' and Title 32, United States Code entitled 'National Guard.':

* * * * *

Each Reserve of the Armed Forces or member of the National Guard who is an officer or employee of the United States or the District of Columbia, permanent or temporary indefinite, without regard to classification or terminology peculiar to the Civil Service System, is entitled to leave of absence from his duties, without loss of pay, time, or efficiency rating for each day, but not more than 15 days in any calendar year, in which he is on active duty, or is engaged in field or Coast defense training under Sections 502-505 of Title 32, United States Code."

STATEMENT

Plaintiff has been employed by the Veterans Administration since December 5, 1945 and has been a member of the United States Naval Reserve since November 6, 1940. Pursuant to Navy Department Orders dated August 29, 1950 (R-9) he reported to the United States Naval School of Justice, Newport, R. I. on November 3, 1950 for a period of temporary active duty under instruction, which he completed on December 22, 1950 and was formally detached therefrom. (R-10)

He subsequently reported to the Judge Advocate General of the Navy for active duty and he remained on active duty until October 5, 1954, when he was released from active duty. (Ex. 1) On November 16, 1954 he resumed his employment at the Veterans Administration. (R-12)

On January 28, 1959 the Veterans Administration paid the plaintiff $671.89 for 11 days' military leave for calendar year 1953 and for 11 days' military leave for calendar year 1954. The memorandum from the Finance Officer to the Personnel Officer dated June 4, 1959 (Ex. 3) cited as the authorities for such payment: 5 USC 30 r Sec. 29; 50 USC App. 459 (c) and (g) (2); Comptroller General's Decisions: B 131514 (37 Comp. Gen. 39); B 133972 (37 Comp. Gen. 255) and B 134171 (37 Comp. Gen. 313 and 608).

On August 24, 1960 the Veterans Administration credited the Plaintiff's pay account the sum of $296.19 representing 11 days' pay for military leave while "under instruction" for calendar year 1950 and debited his pay account for $671.89, the amount it had previously paid him for military leave while on active duty in calendar years 1953 and 1954. The following day, August 25, 1960, the Veterans Administration addressed a letter to the Plaintiff notifying him of these transactions and enclosed a bill of collection for the debit balance. (Ex. 5).

The Veterans Administration took the sum of $671.89 from the Plaintiff's current wages in August, October and November 1960, (Ex. 6), despite his written protest. (Ex. 7)

The Plaintiff appealed to the Comptroller General for reimbursement of the $671.89 by letter dated September 24, 1960. (Ex.9). The Comptroller General denied the Plaintiff's claim by Settlement Certificate No. Z 1794280 dated November 1, 1960 (Appendix B).

The Plaintiff then petitioned the United States Court of Claims invoking its jurisdiction under 28 USC 1491 (R.-1).

REASONS FOR GRANTING THE WRIT

This petition for certiorari to the Court of Claims is for review by this Honorable Court of that court's erroneous decision of an important question of federal law which has not been, but should be, settled by this Honorable Court. The question arises under Sec. 29 (a) of the Act of August 10, 1956, which was a recodification of Sec. 804(a) of the Armed Forces Reserve Act of 1952, which became effective January 1, 1953. The decision of the Court of Claims holds that Congress meant by the term "active duty" in the above Acts, only a special type of active duty for training, often referred to as "summer camp" or "summer cruise;" and further, that when Congress provided entitlement to pay for "not more than 15 days in any calendar year in which he is on active duty" (App. A-19-20) that it meant that he is limited to only 15 days' pay per tour of active duty, even though the tour of active duty extends into more than one calendar year. Thereby, the Court of Claims has held that an administrative agency can add restrictions to the clear terms of an Act of Congress.

Unless these errors of interpretation of Sec. 29(a) of the Act of August 10, 1956 are corrected they will be followed as binding precedents by all government departments and agencies, to deprive government employee-reservists of military leave pay in any calendar year while on extended active duty, such as during the Berlin crisis and the Laotian crisis.

The Court of Claims, subject to review by this Honorable Court under 28 USC 1255, is the sole judicial forum of such claims by government employee-reservists.

ARGUMENT

This case involves no disputed question of fact. The plaintiff was an employee of the United States and a Reserve of the Armed Forces, who was on military leave of absence, while on active duty, in calendar year 1953 and a portion of calendar year 1954. His period of active duty was for less than four years. Thus, under the clear terms of Sec. 29(a) of the Act of August 10, 1956 which was a recodification of Sec. 804(a) of the Armed Forces Reserve Act of 1952, the Plaintiff was paid for 11 days' military leave in calendar years 1953 and 1954 by the Veterans Administration. Yet nineteen months later the Veterans Administration took that sum from the Plaintiff's current wages without his consent, and over his written protest. (Ex. 7).

The decision of the Court of Claims begins by stating (App. A-15) that the sole question presented is whether the statutes providing for saving of civilian pay not to exceed 15 days in any calendar year in which government employee-reservists are on active duty comprehends such payment for each year the reservists are on continuous general military service.

The decision answers that question in the negative by stating (App. A-20) that:

> "The Statutes were not designed to include 15 days pay for each year when on extended active duty."

The decision goes even further and adds:

> "that the saving of civilian pay statutes are all meant to include only the type of training often referred to as 'summer camp' or 'summer cruise.' "

The Court of Claims' definition of the term "active duty" seems to be quite different from the way Congress defined the term in 10 USC 101 (22):

> "Active duty means full-time duty in the active military service of the United States. It includes duty on the active list, full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned."

Bouvier's Law Dictionary, Vol. 1, Rawles' 3rd Edition, page 205, states that the word "any" is "synonymous with 'either' and is given the full force of 'every' or 'all.'".

If there is any doubt that Congress meant "in each calendar year" when it said "in any calendar year" one should look at House Report No. 483 on the Act of July 1, 1947, (U.S. Code Cong. Serv. 80th Cong. 1st Sess. p. 1266) which states as follows:

> "Section 2 gives the National Guard men 15 days' leave of absence **in each calendar year,** the same as is provided for enlisted reservists under Sec. 1(a) and the same as members of the Officers Reserve Corps and naval reservists have under existing law." (emphasis supplied)

Thus it appears that the statutes after January 1, 1953 granted entitlement to government employee-reservists, military leave of absence with pay of 15 days in any or all calendar years in which they were on active duty (unless they were on active duty for more than four years, 50 USC Appendix 459 (c) and (g)). The Vetrans Administration Finance Officer was

justified in so interpreting the statutes which he cited as authority for the payment to Plaintiff of $671.89 for calendar years 1953 and 1954 (Ex. 3).

Yet, the decision of the Court of Claims (App. A-19) states that:

> "In respect to the application of the various statutes, i.e., the Act of May 12, 1917, **supra**, the Act of July 9, 1952, **supra**, and the Act of August 10, 1956, **supra**, the Comptroller General has always ruled and still does, that a maximum of 15 days' military leave of absence with pay is authorized but does not comprehend payment for 15 days for each year of continuous active duty service."

It was because the Court of Claims affirmed the Comptroller General's interpreting the 1956 Act the same way he interpreted the 1917 Act that this petition for writ of certiorari was filed.

But the Comptroller General in his letter to the Plaintiff dated November 1, 1960 (App. B-24) stated he had changed his interpretation:

> "In decisions since the 1952 Act, this Office has held that Government employee-reservists are entitled to 15 days leave of absence without loss of pay, time or efficiency rating for each day but not more than 15 days in any calendar year, in which they serve on active duty for any purpose as a member of a reserve component of the Armed Forces. 37 Comp. Gen. 255; 37 **id.** 313; 37 **id.** 608."

However, in the case of the Plaintiff, the Comptroller General's decision approved the confiscation of the pay he had received for calendar years 1953 and 1954 for the reason, it said, Plaintiff had served a continuous

period of active duty of less than four years. (App. B-24)

It should be pointed out that the Act of May 12, 1917, as amended by the Act of July 1, 1947, and the Naval Reserve Act of 1925 specifically applied to training duty or to duty with troops or at field exercises, or for instruction, etc. But the Armed Forces Reserve Act of 1952, Sec. 804(a) substantially changed the former laws on the subject by adding the words: "active duty for training, or active duty." Then Sec. 29(a) of the Act of August 10, 1956 simply streamlined Sec. 84(a) of the Armed Forces Reserve Act of 1952 by eliminating the surplus verbiage and provided for military leave without loss of pay of not more than 15 days in any calendar year in which the government employee-reservist is on active duty. There are no exclusions as to extended, continuous, or general active duty. Nor does the act limit it to active duty for training only. Nor does the Act contain a limitation of only one leave of absence with pay per tour of active duty.

The Court of Claims decision states, however, that:

> "It is a firmly established principle of law that administrative interpretations of statutes, consistently followed by the agencies charged with their administration, and not expressly changed by Congress, are entitled to great weight."

But the laws on the subject were expressly changed by Congress beginning with the Armed Forces Reserve Act of 1952, Sec. 84(a) which made it very clear that the leave of absence with pay of up to 15 days per calendar year was no longer limited to "duty with troops or at field exercises, or for instruction" or "on training duty" but was for active duty for any purpose.

Both House Report No. 970 and Senate Report No. 2484 to accompany H. R. 7049* which became the Act of August 10, 1956 contain the following:

> "5. **Restatement of Substance** - - - - Where court decisions, opinions of officials such as the Attorney General or the Comptroller General, executive orders, regulations or well-established administrative practice have established authoritative interpretations clarifying ambiguities in the law, the text has been reworded to express those interpretations. These changes have been explained in the applicable revision notes."

The Comptroller General's decisions on the subject since the Act of August 10, 1956, with the exception of Plaintiff's case, have recognized the changes in the statutes, as will be seen from the following quotations therefrom:

37 Comp. Gen. 313, 314:

> "Prior to January 1, 1953, the effective date of the 1952 amendment, government employee-reservists were entitled to military leave with pay from their civilian jobs, not to exceed 15 days in any calendar year, only when ordered to 'duty with troops or at field exercises, or for instruction.'
>
> In view of the changes in the statutes, it is clear that our decisions based on the previous statutes, so far as they held that military leave rights of government employee-members of the Reserve and National Guard did not extend to instances when they are ordered to duty for general services, are not for application under the present statutes."

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*U.S. Code Cong. & Ad. News, Vol. 3, p. 4620 and p. 4640 (1955) 84th Cong. 2nd Sess.

37 Comp. Gen. 608, 609:

> "Thus in general the right to military leave for active duty in the broader sense, extends back to January 1, 1953, rather than August 10, 1956 the effective date of the most recent act."

37 Comp. Gen. 608, 610:

> "See 50 USC App. 459 (c) and (g) concerning persons who are relieved from active duty within four years and who are considered, upon restoration, as having been on furlough or leave of absence during their military service.
>
> * * * *
>
> Viewed in this light, we conclude that Congress, in enacting the 1952 Act, recognized the continuing effect of military orders once issued and, so far as insuring against loss of civilian pay is concerned, did not intend any distinction between employees serving on active military duty after January 1, 1953, in compliance with orders issued prior to that date and employees serving during the same period in compliance with orders issued after that date."

37 Comp. Gen. 255:

> "Chapter R-6-4 of the Federal Personnel Manual provides for the following action when an employee enters active military service: 'When an employee leaves a position in the executive branch of the Federal Government or District of Columbia Government to enter on active military duty, the agency he leaves will either furlough him or separate him, at the option of the agency. Whether the employee is furloughed or separated, he shall be considered as having been on military furlough at the time he returns to duty."

The decision of the Court of Claims seems to have overlooked the most fundamental rule of statutory interpretation, known as "the plain language rule." The Supreme Court of the United States has repeated this rule many times, as in **U. S. v. Temple 105 U.S. 97,99;**

> "Our duty is to read the statute according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation. **Waller vs. Harris** 20 Wend. (N.Y.) 561; **Pott vs. Arthur** 104 U.S. 735. When the language is plain, we have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision."

and in **Lake County vs. Rollins 130 U.S. 662,670:**

> "The language of the sixth section seems neither complicated nor doubtful; and we think it plain that what is meant is exactly what is said; no more and no less."

and again in **Yates vs. U. S. 354 U. S. 298,311:**

> "We, too, think this statute should be read "according to the natural and obvious import of the language, without resort to subtle and forced construction for the purpose of either limiting or extending its operation."

The Court of Claims has held that a department cannot amend an act of Congress, i.e. **Ware Knitters, Inc. v. United States 144 Ct. Cl. 141,147:**

> "—This would mean Congressional approval of a departmental extension or limitation on the Act, and this is beyond the power of the De-

partment; the Department can only construe, not enlarge or limit. Hence Congressional re-enactment means approval of the construction, not approval of an attempted enlargement or restriction."

Black on Interpretation of Laws, 2nd Edition, West Publishing Co. page 141 states:

"If the words and phrases of a statute are not obscure or ambiguous, its meaning and the intention of the legislature must be determined from the language employed, and where there is no ambiguity in the words, there is no room for construction."

page 447:

"Legislation enacted for the purpose of preserving the security and rights of those engaged and participating in defense and war efforts must be given a broad interpretation. In addition legislation undertaking to reward and repay those who have contributed by energy and even their lives in the service should be given unselfish construction."

Plaintiff cited the Act of August 10, 1956 (5 USC 30 r) as the basis for his motion for summary judgment (R-13), although the Court of Claims' decision states otherwise. (App. A-18).

It is worthy of note that Section 29(a) of the Act of August 10, 1956 has been amended in minor details on three occasions, to-wit:

PL 85-861 (72 Stat. 1557), September 2, 1958;
PL 86-559 (74 Stat. 282), July 1, 1960;
PL 87-378 (75 Stat. 809), October 4, 1961

but none of them contain any language excluding 15 days' pay from any calendar year a government employee-reservist serves on active duty.

The decision of the Court of Claims (App. A-20) incorrectly states that the Plaintiff's interpretation of the statute is that:

> "A reservist who served in the Korean conflict would also be entitled to the 15-day civilian pay for each of the years he was in service."

The Plaintiff's interpretation of the statute is not nearly so broad as that, but is that a government employee-reservist would be entitled to not more than 15 days' civilian pay in any calendar year in which he is on active duty, after January 1, 1953; the only limitation being, that according to 50 USC Appendix 459 (c) and (g) a government employee-reservist would not be considered to have been on military furlough or leave of absence if he remained on active duty for more than four years.

SUMMARY

The Court of Claims erred in its holding that: The Act of Congress which provided that a government employee-reservist was entitled to 15 days' civilian pay "in any calendar year in which he was on active duty," meant that he was entitled to only 15 days' civilian pay per tour of active duty, instead; and that "active duty" meant only a special type of active duty for training.

CONCLUSION

For the reasons given above, Petitioner respectfully submits that this petition should be granted.

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APPENDIX A

In The United States Court of Claims

No. 478-60
(Decided April 4, 1962)

ANDREW V. ALLISON v. THE UNITED STATES

Andrew V. Allison, pro se.

Mary J. Turner, with whom was Assistant Attorney General William H. Orrick, Jr., for defendant.

On Plaintiff's and Defendant's Motions for Summary Judgment

Laramore, Judge, delivered the opinion of the court:

Plaintiff seeks reimbursement of an amount of compensation paid to him in 1959 by the Veterans Administration, under section 29 of the Act of August 10, 1956, 70A Stat. 632, which amended the Armed Forces Reserve Act of 1952, 66 Stat. 481, 506, for civilian pay for military leave for the years 1953 and 1954, when he was on extended military service. The sum claimed was paid plaintiff by the Veterans Administration and then recouped in 1960 as an erroneous payment.

The case arises on cross-motions for summary judgment, and the sole question presented is whether the statutes providing for the saving of civilian pay not to exceed 15 days in any calendar year to Government employees who are members of the Reserve components of the Armed Forces, when they are on active duty, comprehend such payment for each year the reservist is on continuous general military service.

The facts are these: Plaintiff, an attorney with the Veterans Administration both at the time he entered general military service and now, has been a member of the U.S. Naval Reserve since November 6, 1940.

On August 29, 1950, basic naval orders were issued to plaintiff for active duty. On October 26, 1950, plaintiff was separated from his civilian employment in order to be inducted into the military service on November 3, 1950. Plaintiff's orders included temporary active duty for qualifying physical examination, and, upon a finding that he was physically qualified, a period of temporary active duty under instruction at the Naval School of Justice, Newport, Rhode Island, beginning November 3, 1950 (the date his separation papers noted he was to be inducted), at the completion of which he was to report to the Judge Advocate General, Navy Department, Washington, D.C., for active duty. The course of instruction provided for in plaintiff's orders to active duty was completed on December 22, 1950, when he was detached therefrom and ordered to comply with basic orders. Plaintiff served on such active duty until October 5, 1954, and returned to his civilian employment on November 16, 1954.

On November 21, 1958, plaintiff made claim to the Veterans Administration for payment for military leave for the calendar years 1951, 1952, 1953 and 1954, and it was determined by the Veterans Administration that he was entitled to payment for the years 1953 and 1954 on the basis of certain Comptroller General decisions. Payment was made therefor on January 28, 1959.

On January 14, 1960, plaintiff made an additional claim to the Veterans Administration for military leave for the year 1950 on the authority of a statement in

Comptroller General Decision B-134171, 37 Comp. Gen. 313, 314 for the period of active duty "under instruction" included in his original active duty orders. The Veterans Administration Regional Office considered this claim a doubtful one and submitted it to its Central Office, Washington, D.C., for decision, which office determined that plaintiff was entitled to this payment, "if otherwise proper," but that payment for the years 1953 and 1954 was erroneous and recoupment was in order. Plaintiff was so advised on August 25, 1960, was further advised that the claim allowance for 1950 would be applied to the indebtedness, and was requested to indicate how he wished to liquidate the balance of the indebtedness.

As no reply had been received to the Veterans Administration letter of August 25, 1960, by September 19, 1960, he was advised on that date that action was being taken to withold the balance due from his salary. The following day plaintiff formally protested the deduction, and reply was made by the Veterans Administration on September 21, 1960.

On September 24, 1960, plaintiff submitted his claim to the Comptroller General who held, under Settlement Certificate Z1794280, dated November 1, 1960, that an employee may not be granted an excess of 15 days' military leave of absence with pay for any one authorized period of training duty, whether it extends into one or more calendar years, and denied plaintiff's claim. Petition was filed in this court on December 30, 1960, claiming recovery of the amount withheld by the Veterans Administration in 1960 for military leave for the years 1953 and 1954.

Plaintiff has not given the court the benefit of a

brief respecting his motion for summary judgment and has cited no statute as the basis of his claim. Therefore, we assume that the basis of his claim is that set forth in his letter to the Comptroller General wherein he recited in effect that because the Act of August 10, 1956 provides for leave of absence from one's civilian duties without loss of pay to each reservist of the Armed Forces for each day in which he is on active duty, but not more than 15 days in any calendar year, he is therefore entitled to such payment for each calendar year he was on extended active military service.

The Act of August 10, 1956, **supra,** does not apply to plaintiff. His 4-year tour of military service had been completed. He had resumed and was pursuing his civilian career for almost two years before that act was passed. However, plaintiff's reliance on the 1956 Act rather than the effective Act, Armed Forces Reserve Act of 1952, **supra,** is of no consequence in that the 1956 Act merely restated a right already in existence. 37 Comp. Gen. 608, 609. The basic statute affecting plaintiff's claim, therefore, is the Act of July 9, 1952 **supra,** which amended the Act of May 12, 1917, 40 Stat. 40, 72, and provided in pertinent part:

> * * * all officers and employees of the United States or of the District of Columbia who shall be members of the Officers' Reserve Corps shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be ordered to duty with troops or at field exercises, or for instruction, for periods not to exceed 15 days in any one calendar year.

The Act of July 9, 1952, **supra,** amended the Act of May 12, 1917, by striking out the words "Officers'

Reserve Corps or Enlisted Reserve Corps" wherever they appear therein and by inserting in lieu thereof the words "reserve components of the Armed Forces" and by inserting in the third paragraph after the word "ordered" where it first appears the words "to active duty for training, or active duty, or." Thus the Act of July 9, 1952, is amended to read as follows:

> * * * all officers and employees of the United States or of the District of Columbia who shall be members of the reserve components of the Armed Forces shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be ordered to active duty for training, or active duty, or to duty with troops or at field exercises, or for instruction, for periods not to exceed 15 days in any one calendar year.

In respect to the application of the various statutes, **i.e.,** the Act of May 12, 1917, **supra,** the Act of July 9, 1952, **supra,** and the Act of August 10, 1956, **supra,** the Comptroller General has always ruled and still does, that a maximum of 15 days' military leave of absence with pay is authorized but does not comprehend payment for 15 days for each year of continuous active duty service. In other words, in the language of the Comptroller General contained in his letter of November 1, 1960, to plaintiff:

> As your period of military service extended from October 28, 1950 to October 5, 1954—one continuous period of less than four years—there is no authority in law for allowing more than one 15-day period of military leave for this service.

The Comptroller General's rulings are all in accord with the intent of Congress, **i.e.,** that the saving of civi-

lian pay statutes are all meant to include only the type of training often referred to as "summer camp", or "summer cruise." The statutes were not designed to include 15 days' pay for each year when on extended active duty.

Senate Report No. 1795[1], June 19, 1952, to accompany H.R. 5426, which became the Armed Forces Reserve Act of 1952, states:

> The bill provides that individuals who are in active status may be ordered to perform not to exceed 15 days of active duty training annually. This liability runs to individuals not assigned to a unit, as well as to those assigned to units. This is the type of training often referred to as "summer camp" or "summer cruise."

An example of what plaintiff's interpretation could lead to is this: A reservist who served in the Korean conflict would also be entitled to the 15-day civilian pay for each of the years he was in service. Likewise, should the prospect of another international holocaust eventuate, each reservist would be entitled to payment for 15 days for each year he served in the Armed Forces. This clearly was not the intent of Congress when it passed the Armed Forces Reserve Act of 1952, **supra.**

It is a firmly established principle of law that administrative interpretations of statutes, consistently followed by the agencies charged with their administration, and not expressly changed by Congress, are entitled to great weight. **Billings** v. **Truesdell,** 321 U.S. 542; **United States** v. **Bergh,** 352 U.S. 40; **Hevenor** v.

[1] U.S. Code Cong. & Ad. News, Vol. 2, p. 2008 (1952), 82nd Cong., 2nd Sess.

United States, 121 Ct. Cl. 77; **Luna** v. **United States,** 124 Ct. Cl. 52.

It has also been held by this court that repeated enactment of an act that has been construed by the department charged with its enforcement, evidences congressional sanction of the construction the department has placed upon it. **Ware Knitters, Inc.** v. **United States,** 144 Ct. Cl. 141, 147.

Plaintiff was paid for one 15-day period and that is all that is due him. The Veterans Administration's action in recovering the erroneous payment to plaintiff was in all respects legal, proper, and not arbitrary or capricious. Consequently, plaintiff is not entitled to recover in this action.

Defendant's motion for summary judgment is granted, and plaintiff's motion is denied. Plaintiff's petition is dismissed. It is so ordered.

DURFEE, **Judge**; WHITAKER, **Judge**; and JONES, **Chief Judge,** concur.

Appendix "B"

SETTLEMENT CERTIFICATE

GENERAL ACCOUNTING OFFICE
WASHINGTON 25, D.C.

Division: Claims
Claim No. Z 1794280

MR. ANDREW V. ALLISON
302 East Melrose Drive
San Antonio 12, Texas

Sir:

Your claim for $671.89, amount of an erroneous payment made to you for military leave in 1953 and 1954 and recovered by the Veterans Administration Regional Office, San Antonio 5, Texas, is disallowed for the reasons stated below.

The record discloses that you were separated from the Veterans Administration for military service close of business October 26, 1950 and elected to receive a lump sum payment for annual leave. Military orders dated August 29, 1950 and first endorsement thereto dated September 5, 1950 required you to report for physical examination for active duty (temporary active duty during time required for physical examination and travel, then release from active duty until such time as was necessary to proceed for temporary active duty under instruction, then active duty). Your DD 214 shows entry into active service October 28, 1950 and separation October 5, 1954. You returned to your civilian position.

Upon return to your civilian position, the Veterans Administration paid you the sum of $671.89 to cover two periods of 15 calendar days military leave as a reservist; one, from January 4, to 19, 1953, and second, from January 3, to 18, 1954. You subsequently claimed 15 days military leave for the period November 3, to December 22, 1950 while undergoing military duty under instruction. The Veterans Administration on August 25, 1960 credited your pay account with $269.19 for 15 days military leave covering the 1950 period. They then charged your pay account with the $671.89 previously paid to you for the reason that this payment was made without authority. You now reclaim that amount.

In support of your claim for refund of the amount involved you cite the act of August 10, 1956, 5 U.S.C. 30(r) and assert that the interpretation that "no more than 15 days military leave can be paid for any one period of active duty, whether in one or more calendar years", is inconsistent with and contrary to the express terms of the statute and amounts to legislative amendment by an administrative agency.

Under the act of August 10, 1956, Government employees are entitled to leave of absence without loss of pay, time or efficiency rating for "each day" but not more than 15 calendar days in any calendar year, in which he serves on active duty for any purpose—training or otherwise—as a member of a reserve component of the Armed Forces. The broadened entitlement was created by the Armed Forces Reserve Act of 1952, 66 Stat. 506, which became effective January 1, 1953. The statute providing for military leave in effect when the Armed Forces Reserve Act of 1952 was enacted was the

act of May 12, 1917 (40 Stat. 72) as amended by the act of July 1, 1947 (61 Stat. 238). In decisions since the 1952 act, this Office has held that Government employee reservists are entitled to 15 days leave of absence without loss of pay, time or efficiency rating for each day, but not more than 15 calendar days in any calendar year, in which they serve on active duty for any purpose as a member of a reserve component of the Armed Forces. 37 Comp. Gen. 255; 37 id. 313; 37 id. 608. And it may be stated also that in applying the statute a period of authorized training duty extending beyond the end of the calendar year in which it begins may not be divided into separate periods corresponding to calendar years so as to grant an employee an excess of 15 days military leave of absence with pay for any one authorized period of training duty, whether in one or more calendar years. 10 Comp. Gen. 116; 29 id. 269. Each period of authorized training duty, and each maximum period of authorized leave of absence without loss of pay, time or efficiency rating, is intended to be considered as a separate and distinct unit of time, relating to the calendar year. Further the statutes authorizing military leave for reservists have never been viewed as permitting more than the grant of 15 days of military leave for any one period of qualifying military duty. 35 Comp. Gen. 708.

Public Law 85-861, approved September 2, 1958, 72 Stat. 1557, which you cited in further support of your position relates to military leave for substitutes in the postal field service and has no application to the facts of your case.

As your period of military service extended from October 28, 1950 to October 5, 1954—one continuous

period of less than four years—there is no authority in law for allowing more than one 15 day period of military leave for this service.

Respectfully,

Comptroller General
of the United States

By: T. H. Loy

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JOHN F. DAVIS, CLERK

No. 378

In the Supreme Court of the United States

OCTOBER TERM, 1962

ANDREW V. ALLESON, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General,
MORTON HOLLANDER,
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THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petition presents the question whether the Veterans Administration, the Comptroller General and the Court of Claims properly ruled that a government employee who is called to active military duty and serves for a period in excess of one year is entitled, under 10 U.S.C. 371 (1952 ed.),[1] to double compensa-

[1] During the period at issue here, the statute provided:

"All officers and employees of the United States or of the District of Columbia who shall be members of the reserve components of the Armed Forces shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be ordered to active duty for training, or active duty, or to duty with troops or at field exercises, or for instruction, for periods not to exceed fifteen days in any one calendar year * * *."

The statute was initially enacted in 1917 (40 Stat. 72) in the above form except that it was limited to employees who

tion, *ie.*, civilian pay in addition to military compensation, for a single 15-day period rather than, as petitioner contends, for multiple periods of 15 days, one for each calendar year of service.

Petitioner, while employed as an attorney with the Veterans Administration, received orders to active duty as a member of the United States Naval Reserve. He was inducted on November 3, 1950, and served through October 5, 1954, when he returned to the Veterans Administration. Petitioner made claims to the Veterans Administration for payment for 15 days' military leave for each of the calendar years of his service, 1950 through 1954. The agency ruled that he was entitled to a single payment for 15 days' military leave for the full term of his service.[2] A protest to the agency was denied and petitioner submitted his claim to the Comptroller General who held (Pet. App. 22–25) that an employee may not be granted an excess of 15 days military leave of absence with pay for any one continuous period of service whether it extends beyond one or more calendar years. Peti-

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were members of the "Officers' Reserve Corps" "ordered to duty with troops or at field exercises, or for instruction * * *." It was amended in 1947 (61 Stat. 238) to extend its benefits to members of the "Enlisted Reserve Corps" and was again amended in 1952 (66 Stat. 506) to provide expressly for employees ordered to "active duty for training, or active duty."

[2] Petitioner claimed first for the years 1951 through 1954 and the Veterans Administration determined that he was entitled to payment for the years 1953 and 1954 (Pet. App. 16). Thereafter petitioner made an additional claim for the year 1950. In ruling on the claim, the Veterans Administration held that the payment for the years 1953 and 1954 had been erroneous and that petitioner was entitled to payment for a single 15-day period only (Pet. App. 17).

tioner then filed a claim in the Court of Claims which upheld the ruling of the Comptroller General (Pet. App. 15–21; 301 F. 2d 670).

The rulings of the Comptroller General and the Court of Claims are plainly correct. They accord with the consistent interpretation given the statute by the Comptroller General since 1930 and with the intent of Congress which has amended the statute three times (1947, 1952 and 1956) without changing the terms at issue here. There is no conflict of decisions. The question has no general importance and petitioner advances no other grounds warranting review by this Court.

Since 1917 Congress has provided dual compensation for certain government employees on all days during which they shall be ordered to military duty "for periods not to exceed fifteen days in any one calendar year * * *." The Comptroller General first interpreted the statute in 1930 (10 Comp. Gen. 116) to provide "a maximum of 15 days' military leave of absence with pay * * * for any one period of training duty if equal to or in excess of 15 days, regardless of length and whether in one or more calendar years * * *." Since that time, the Comptroller General has consistently adhered to this interpretation. 29 Comp. Gen. 269 (1949); 35 Comp. Gen. 708 (1956). In 1947 and 1952 the statute was amended (see footnote 1, *supra*) but the language limiting the period of dual compensation remained the same. Under the circumstances, petitioner is plainly in error in contending that the Comptroller General

has added restrictions not present in the statute in denying this claim and holding (Pet. App. 24–25):[3]

> As your period of military service extended from October 28, 1950 to October 5, 1954—one continuous period of less than four years—there is no authority in law for allowing more than one 15 day period of military leave for this service.

There is no merit to petitioner's contentions that Congress has evidenced a desire to alter this consistent interpretation of the statute.[4] In its description of the period of service for which dual compensation is allowed, the statute has remained the same from 1917 to date. Amendments to extend this relief to enlisted men and to employees called to active duty

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[3] The decisions of the Comptroller General cited and quoted by petitioner on pages 10 and 11 of his petition are not in conflict with the decision in the instant case or with the consistent construction of the statute. Thus, in 37 Comp. Gen. 313, 315 (1957), the Comptroller General held that an employee activated for the period from October 6, 1957 to April 5, 1958, was entitled to leave not to exceed 15 days, and that the administrative office might designate any one 15-day period during that tour of duty, not necessarily the first 15 days, as military leave, so long as the intent of the statute was otherwise observed. 37 Comp. Gen. 255 (1957) and 37 Comp. Gen 608 (1958) are similarly in accord with the Comptroller General's construction.

[4] The Act of 1956 (70A Stat. 632, 5 U.S.C. 30r), on which petitioner relies, did not become effective until after the service in issue here and has no bearing on the question presented. The Court of Claims properly so held (Pet. App. 18). In any event, the subsequent legislation left the operative words of the statute unchanged and shows no congressional intent to allow multiple claims for dual compensation for a single period of service. See § 49(a), 70A Stat. 640; S. Rep. No. 2484, 84th Cong., 2d Sess., pp. 19, 742 (1956).

afford no basis for petitioner's contention that Congress meant to increase beyond 15 days the period of dual compensation allowed for each call to service. In light of the established administrative construction of the statute, the Court of Claims was clearly warranted in holding that, had Congress intended to make such a change, it would have done so expressly. In absence of such action, the court properly gave effect to the interpretation of the statute consistently followed by the agencies charged with its administration. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139–140; *United States* v. *Bergh*, 352 U.S. 40, 46–47.

CONCLUSION

For these reasons the petition for a writ of certiorari should be denied.

Respectively submitted.

ARCHIBALD COX,
Solicitor General.

JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

MORTON HOLLANDER,
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Attorneys.

SEPTEMBER 1962.

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